

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re  
VENTURE FINANCIAL GROUP, INC.,  
Debtor.

Case No. 13-46392-BDL

MARK D. WALDRON, chapter 7 trustee  
for Venture Financial Group, Inc.,  
Plaintiff,

Adversary Proceeding No. 14-04194-BDL

DEFENDANT'S NOTICE OF APPEAL

vs.

FEDERAL DEPOSIT INSURANCE  
CORPORATION, in its capacity as  
Receiver of Venture Bank,  
Defendant.

**Part 1. Identify the appellant(s)**

1. Name(s) of appellant(s): Federal Deposit Insurance Corporation, as Receiver for Venture Bank.

DEFENDANT'S NOTICE OF APPEAL - 1

**MILLER NASH GRAHAM & DUNN LLP**

ATTORNEYS AT LAW  
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70062141.1  
727986.0003

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

For appeals in a bankruptcy case and not in an adversary proceeding.

☐ Plaintiff

☒ Defendant

☐ Other (described): \_\_\_\_\_

☐ Debtor

☐ Creditor

☐ Trustee

☐ Other (describe) \_\_\_\_\_

**Part 2. Identify the subject of this appeal.**

1. Describe the judgment, order, or decree appealed from: Order on Motions for Summary Judgment (ECF #80).

2. State the date on which the judgment, order, or decree was entered: November 5, 2015.

A copy of the order appealed from is attached hereto.

**Part 3. Identify the other parties to the appeal**

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: Federal Deposit Insurance Corporation, as Receiver for Venture Bank

Attorney: Teresa H. Pearson, WSB No. 25889  
Miller Nash Graham & Dunn LLP  
111 S.W. Fifth Avenue, Suite 3400  
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DEFENDANT'S NOTICE OF APPEAL - 2

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2. Party Mark D. Waldron, chapter 7 Attorney: Dillon E. Jackson, WSB No. 1539  
trustee for Venture Financial Foster Pepper PLLC  
Group, Inc. 1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
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**Part 4. Optional election to have appeal heard by District Court (applicable only in certain districts)**

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 168(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

☒ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

**Part 5. Sign below**

/s/ Teresa H. Pearson

Date: November 19, 2015

Signature of attorney for appellant(s)(or  
appellant(s) if not represented by an attorney

Name, address, and telephone number of  
attorney (or appellant(s) if not represented by an  
attorney):

Teresa H. Pearson, WSB #25889  
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Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

DEFENDANT'S NOTICE OF APPEAL - 3

Below is the Order of the Court.



*Brian D. Lynch*

**Brian D. Lynch**  
**U.S. Bankruptcy Judge**  
(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

VENTURE FINANCIAL GROUP, INC.,  
  
Debtor.

Case No. 13-46392-BDL

MARK D. WALDRON,  
  
Plaintiff,

Adversary No. 14-04194-BDL

v.

FEDERAL DEPOSIT INSURANCE  
CORPORATION,  
  
Defendant.

**ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT**

The chapter 7 trustee ("Trustee") for the bankruptcy estate of Venture Financial Group, Inc. ("VFG") filed a complaint against the Federal Deposit Insurance Corporation in its capacity as receiver of Venture Bank ("FDIC-R") asserting four claims, each stemming from the estate's alleged ownership of certain tax refunds. FDIC-R contends that the tax refunds at issue were owned by Venture Bank, a wholly-owned subsidiary of VFG. The parties each filed motions for summary judgment [ECF no. 51, 61], as well as responses [ECF no. 68, 70] and

1 replies [ECF no. 74, 77]. A hearing on the parties' motions for summary judgment was held on  
2 October 8, 2015. Trustee appeared through his counsel, Dillon Jackson, and FDIC-R  
3 appeared through its counsel, Teresa Pearson. At the hearing, Trustee abandoned his claim  
4 seeking declaratory judgment, leaving three unresolved claims concerning ownership of the  
5 tax refunds. After hearing oral arguments from both parties, the Court took the matter under  
6 advisement.

### 7 **A. Evidentiary Issues**

8 Along with the parties' motions for summary judgment, responses, and replies, the  
9 Court considered supporting declarations submitted by FDIC-R from Justin Martin [ECF no.  
10 52] and by Trustee from Dillon Jackson, Kenneth Parsons, James Arneson, and Sandra  
11 Sager [ECF no. 62-65, 71], as well as various exhibits and deposition excerpts submitted by  
12 FDIC-R [ECF no. 53-55]. FDIC-R filed a series of objections to Trustee's supporting  
13 declarations [ECF no. 69, 75], and Trustee responded [ECF no. 78]. In an oral ruling at the  
14 October 8, 2015 hearing, the Court sustained FDIC-R's objections to certain portions of those  
15 declarations but otherwise overruled FDIC-R's objections and considered the declarations as  
16 part of the record.  
17

### 18 **B. Summary Judgment**

19 Federal Rule of Civil Procedure 56(a), made applicable in this proceeding by Federal  
20 Rule of Bankruptcy Procedure 7056, provides that "The Court shall grant summary judgment if  
21 the movant shows that there is no genuine dispute as to any material fact and the movant is  
22 entitled to judgment as a matter of law." At the summary judgment stage, evidence must be  
23 viewed in the light most favorable to the nonmoving party, and all justifiable inferences must  
24  
25

1 be drawn in the nonmovant's favor. See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954,  
2 960 (9th Cir. 2011).

### 3 **1. The Tax Refunds**

4 Venture Bank and Venture Wealth Management, Inc. are both wholly-owned  
5 subsidiaries of VFG (collectively, the "Consolidated Group"). In the past, VFG, as the parent  
6 corporation, served as sole agent for the Consolidated Group for tax purposes, pursuant to 26  
7 C.F.R. § 1.1502-77. In 2009, Venture Bank was closed and placed into federal receivership,  
8 with FDIC-R appointed as receiver. In 2011, FDIC-R made a request to the Internal Revenue  
9 Service (the "IRS") to serve as alternative agent to file tax returns for the Consolidated Group,  
10 pursuant to 26 C.F.R. § 301.6402-7, which was approved despite VFG's objection. Between  
11 2011 and 2013, FDIC-R filed amended tax returns as alternative agent for the Consolidated  
12 Group, requesting refunds for years 2004 through 2007. VFG filed its voluntary chapter 7  
13 petition on October 10, 2013.

14  
15 This dispute concerns ownership rights to tax refunds received by FDIC-R, as  
16 alternative agent for the Consolidated Group, in the amounts of \$6,204,763.10 pre-petition  
17 and \$2,267,219.26 post-petition (the "Tax Refunds"). As ordered by the Court, the Tax  
18 Refunds are currently held in a neutral account pending resolution of this ownership dispute  
19 [Case no. 13-46392, ECF no. 98]. The parties agree that the Tax Refunds are solely  
20 attributable to loss carrybacks of Venture Bank.

### 21 **2. Bob Richards**

22 "In the context of tax refunds attributable to a subsidiary (but held by a parent as a  
23 result of a decision to file consolidated tax returns)... 'the parties are free to adjust among  
24 themselves the ultimate tax liability.'" *In re Indymac Bancorp, Inc.*, 554 F. App'x 668, 669 (9th  
25

1 Cir. 2014) (quoting *W. Dealer Mgmt. v. England (In re Bob Richards Chrysler-Plymouth*  
2 *Corp.)*, 473 F.2d 262, 264 (9th Cir. 1973) (“*Bob Richards*”). Under *Bob Richards*, “where the  
3 parties have made no agreement concerning the ultimate disposition of the tax refund, the  
4 parent holds the tax refunds in trust for the subsidiary.” *Id.* (internal quotations omitted).  
5 Therefore, the threshold issue for determining ownership of the Tax Refunds is whether there  
6 is an agreement concerning the ultimate disposition of the Tax Refunds, which “may be done  
7 through an explicit agreement, or an agreement implied by the parties' past practices.” *Id.*  
8 (citing *Bob Richards*, 473 F.2d at 264 & n. 4) (internal quotations omitted).

9 The parties' positions on the threshold issue continue to evolve, but suffice to say there  
10 are disputes regarding whether the tax allocation agreement of VFG's predecessor-in-interest  
11 is still in effect, whether that agreement was abandoned, whether that agreement was  
12 supplanted by a more recent written agreement which cannot be located, whether there was  
13 an agreement which may be implied by the parties past practices, and what the terms of the  
14 alleged written or implied agreement are. There are genuine issues of material facts which  
15 prevent the Court from resolving this issue on summary judgment.  
16

### 17 **3. The Policy Statement and Treasury Regulations**

18 FDIC-R relies on the 1998 Interagency Policy Statement on Income Tax Allocation in a  
19 Holding Company Structure (the “Policy Statement”) and related Treasury regulations in two  
20 ways: first, by asserting that the Policy Statement and Treasury regulations support the  
21 conclusion that the Tax Refunds are not property of VFG's bankruptcy estate, and second, by  
22 alleging that the parties and their predecessors-in-interest followed procedures mirroring the  
23 Policy Statement and Treasury regulations.  
24  
25

1 The Policy Statement was issued “to provide guidance to banking organizations and  
2 savings associations regarding the allocation and payment of taxes among a holding  
3 company and its subsidiaries.” Interagency Policy Statement on Income Tax Allocation in a  
4 Holding Company Structure, 63 Fed.Reg. 64757-01 (Nov. 23, 1998).<sup>1</sup> The Policy Statement  
5 encourages written tax allocation agreements, and provides suggestions for how those  
6 agreements should address certain issues.

7 One of those suggestions is that “an organization's tax allocation agreement or other  
8 corporate policies should not purport to characterize refunds attributable to a subsidiary  
9 depository institution that the parent receives from a taxing authority as the property of the  
10 parent.” *Id.* That suggestion is based on the Policy Statement’s guidance that, pursuant to 26  
11 C.F.R. § 1.1502-77(a), “a parent company that receives a tax refund from a taxing authority  
12 obtains these funds as agent for the consolidated group on behalf of the group members.” *Id.*

13  
14 26 C.F.R. § 1.1502-77 is a Treasury regulation generally establishing that the parent  
15 company serves as the sole “agent” for “all matters relating to the federal income tax liability  
16 for the consolidated return year for each member of the group.” 26 C.F.R. § 1.1502-77(a)(1).  
17 Similarly, 26 C.F.R. § 301.6402-7 is a Treasury regulation outlining procedures for issuing tax  
18 refunds when the consolidated group includes an insolvent financial institution, and allowing a  
19 fiduciary to be deemed an “agent” under 26 C.F.R. § 1.1502-77 when certain notice  
20 requirements are satisfied. 26 C.F.R. § 301.6402-7(c).

21 The Policy Statement is “non-binding” and legally “irrelevant” to adjudicating the  
22 ownership of the Tax Refunds. *In re IndyMac Bancorp, Inc.*, No. 2:08-BK-21752-BB, 2012 WL  
23

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24  
25 <sup>1</sup> The agencies consist of The Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision. Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 63 Fed.Reg. 64757-01.



1 1037481, at \*39 (Bankr. C.D. Cal. Mar. 29, 2012) *report and recommendation adopted sub*  
2 *nom. In re IndyMac Bancorp Inc.*, No. CV 12-02967-RGK, 2012 WL 1951474 (C.D. Cal. May  
3 30, 2012) *aff'd sub nom. In re Indymac Bancorp, Inc.*, 554 F. App'x 668 (9th Cir. 2014); see  
4 *also In re Vineyard Nat. Bancorp*, 508 B.R. 437, 446 (Bankr. C.D. Cal. 2014) (“nothing in the  
5 [Policy Statement] renders it legally binding or has the force of law”). Therefore, the Court will  
6 only consider the Policy Statement to whatever extent it can be shown that it was expressly or  
7 impliedly incorporated into a tax allocation agreement. See, e.g., *In re NetBank, Inc.*, 729 F.3d  
8 1344, 1350 (11th Cir. 2013) (agreement included a “clear expression” that “the intent of the  
9 parties was to comply with the Policy Statement.”) *cert. denied sub nom. Zucker v. F.D.I.C.*,  
10 135 S. Ct. 476, 190 L. Ed. 2d 357 (2014).

11 Like the Policy Statement, the Treasury regulations “are basically procedural in  
12 purpose and were adopted solely for the convenience and protection of the federal  
13 government,” and none of those regulations can be construed to govern the issue of  
14 ownership. *Bob Richards*, 473 F.2d at 265; see also *In re IndyMac Bancorp, Inc.*, 2012 WL  
15 1037481 at \*6 (“Tax regulations concerning the payment of refunds to a holding company (or  
16 any other entity) are not determinative of the ultimate ownership of such refunds.”); *In re Team*  
17 *Financial, Inc.*, No. 09-10925, 2010 WL 1730681, at \*7 (Bankr. D. Kan. Apr. 27, 2010) (neither  
18 26 C.F.R. § 1.1502-77 nor 26 C.F.R. § 301.6402-7 determine the ownership of any  
19 overpayment or refund.). Moreover, 26 C.F.R. § 301.5402-7 explicitly states that it  
20 “determines the party to whom a refund or tentative carryback adjustment will be paid but is  
21 not determinative of ownership of any such amount among current or former members of a  
22 consolidated group (including the institution).” 26 C.F.R. § 301.5402-7(j). Therefore, the Court  
23  
24  
25

1 will not give any legal significance to Treasury regulations in determining ownership of the Tax  
2 Refunds.

3 Having determined that the Policy Statement and related Treasury regulations are  
4 legally insignificant for determining ownership of the Tax Refunds, the Court also declines to  
5 attribute any legal significance to FDIC-R's filing of income tax returns or receiving the Tax  
6 Refunds from the IRS as alternative "agent" for the Consolidated Group. "Case law makes  
7 clear that this "agent" status is procedural only and without effect on the parties." *In re*  
8 *IndyMac Bancorp, Inc.*, 2012 WL 1037481 at n. 13 (citing *Bob Richards*, 473 F.2d at 265).  
9 "Tax regulations concerning the payment of refunds to a holding company (or any other entity)  
10 are not determinative of the ultimate ownership of such refunds." *Id.* at \*6. *See also In re*  
11 *Vineyard Nat. Bancorp*, 508 B.R. at 446 (it is "irrelevant" which party "received the tax refunds  
12 directly from the IRS.").

13  
14 **4. 28 U.S.C. § 1823(e)**

15 FDIC-R also argued that any alleged tax allocation agreement would be unenforceable  
16 pursuant to 12 U.S.C. § 1823(e), which imposes certain conditions on the enforcement of an  
17 "agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance  
18 Corporation] in any asset acquired by it" as receiver. 12 U.S.C. § 1823(e)(1).

19 12 U.S.C. § 1823(e) only applies to "conventional loan" transactions. *In re IndyMac*  
20 *Bancorp, Inc.*, 2012 WL 1037481 at \*41. Tax allocation agreements are not the sort of "regular  
21 banking transaction" to which 12 U.S.C. § 1823(e) is intended to apply. *Id.* Therefore, 12  
22 U.S.C. § 1823(e) is "legally and factually inapplicable" to the Court's determination of  
23 ownership of the Tax Refunds. *Id.*

1       **C. Conclusion**

2           The Court grants partial summary judgment to Trustee as to certain claims made by  
3       FDIC-R, as spelled out in this ruling, but denies both parties' motions for summary judgment  
4       as to the central question of whether there is an agreement that determines the ownership of  
5       the Tax Refunds, and if so, what the terms of that agreement are. Summary judgment is also  
6       granted to FDIC-R on Trustee's declaratory judgment claim which Trustee has abandoned.  
7       Pursuant to the scheduling order, the Court will issue a separate order setting a pre-trial  
8       conference to discuss trial setting and related issues.

9                               /// END OF ORDER ///